PETITION NOT PRINTED

In the Supreme Court of the United States

Civil Case No. 10 374

Miscellaneous.

OCTOBER TERM, 1951.

JOHN F. DICE,
Petitioner,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the Supreme Court of Ohio will be reported in 155 Ohio State Reports, page 185, and now found in the Advance Reports, 98 North Eastern 2nd, 301. The opinions of the Ohio Court of Appeals and the Common Pleas Court of Summit County, Ohio, are not reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 929 (3) of the Judicial Act of June 25, 1948; 28 U. S. C. A. 1257.

QUESTIONS PRESENTED.

1. Has the Supreme Court of Ohio decided a Federal question of substance not theretofore determined by this Court, or has it decided a question in a way probably not in accord with applicable decisions of this Court?

2. Did the Supreme Court of Ohio err in deciding that the trial Court (the Common Pleas Court) had the right to determine, under the pleadings and the evidence of the case, the issue as to whether an employee of a railroad was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employer's Liability Act?

HISTORY.

Since a statement of the course taken by the proceedings in the State Courts, as well as of the facts, becomes necessary to determine whether the judgment of the Ohio Supreme Court should be reviewed by this Court, attention is directed thereto.

On May 21, 1947, Petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, against Respondent, to recover damages of $50,200.00 for personal injuries and expenses, arising out of an accident which occurred on May 29, 1944, when a locomotive, upon which he was working as a fireman, was derailed near Rushmore, Ohio, when the parties were engaged in Interstate Commerce. He described his injuries as:

> "bruises and contusions all over his entire body, particularly in the region of his lower left abdomen (or groin); internal injuries and severe traumatic shock;"

Respondent by its answer admitted that at the time of said occurrence the parties were engaged in Interstate Commerce; that there was a derailment of the locomotive upon which Petitioner was engaged as a fireman, and that he sustained some injuries, with a denial of any negligence upon its part. As a second defense it specifically set forth an agreement and release dated September 5, 1944, executed by Petitioner and averred payment of the sum of $924.63 to Petitioner as a full and complete settlement and

release of any and all claims set forth in said petition. (See Exhibits 6, R. 5, 125, 165; and 18, R. 147, 274.)

On August 4, 1947, Petitioner filed a reply in which he said:

"First: One Hochberg, Chief Clerk, informed him in September, 1944,

(a) It would be necessary to sign a paper releasing defendant from all claims for loss of time and medical expenses up to that date before he could go back to work.

(b) That in the event of Plaintiff's inability to work in the future or if he incurred further medical expenses in the future as a result of Plaintiff's injury in May, 1944, the disability file of Plaintiff would be reopened.

Second: That he relied on promises and representations, 'a' and 'b.'

Third: That after September, 1944, he requested Defendant to reopen this case pursuant to said promises and representations, and that Defendant's agents, Clerk Hochberg and Vice President Watkins, agreed to do so.

Four: That on April 29, 1947, he was instructed by Watkins to present himself to Defendant's doctor for another examination, and that he complied with such instructions.

Fifth: That thereafter Defendant refused to honor Plaintiff's claim for compensation and reimbursement of medical expense.

Sixth: That Defendant's promises were false and fraudulent and made for the purpose and with the intent of defrauding Plaintiff.

Seventh: That he received no consideration for the execution of said release."

The cause came on for trial on May 29, 1949 and the jury, after long deliberation, was discharged because of failure to reach a verdict. During trial and over objection, Petitioner filed an amended reply in which he said:

"First: Same as 'a' above.

Second: That at the time of the execution of the release, he did not know it was a full and complete release of all claims, demands, and causes of action he had against Defendant.

Third: That Hochberg represented that said release was only for the wages lost by Plaintiff to date thereof by reason of his being unable to work because of the injuries he sustained May 29, 1944.

Fourth: Same as Sixth and Seventh above."

On October 13, 1949, the cause came on for retrial, whereupon Respondent filed a demurrer to said amended reply, which was overruled. Respondent objected to proceeding to trial by jury until the validity of the pleaded release be determined, and requested that all issues of law apparent from the face of the pleadings be tried by the court, and that the validity of the release be determined by the court as a matter of law, separate and apart from, and prior to the determination of any issues of fact, all of which objections and requests were denied. Respondent also moved for judgment on the pleadings and opening statement of counsel for Petitioner, which motion was overruled, and objected to the introduction of any evidence on the ground that the Petitioner did not have a cause of action upon the face of the pleadings, which was likewise overruled. Respondent, at the close of Petitioner's evidence and all of the evidence moved for a directed verdict, which motions were overruled. The jury returned a verdict for Petitioner for $25,000.00 with the following interrogatories and answers:

Question: If you find in favor of the plaintiff on the issue with respect to the validity of the "agreement and release" of September 5, 1944 (Exhibit 6), then state and describe the act or acts of defendent, upon which you base such finding.

Answer: *We, of the jury, consider Exhibit 8 null and void since the defendant did not adhere to the validity of the "agreement and release," known as Exhibit 8, therefore, reopening the situation by continuing to make payments to the plaintiff. We find Exhibit 6 invalid because of conflicting dates September 5th and September 9th, 1944.*

Question: Did plaintiff have an opportunity to read the "agreement and release" of September 5, 1944 (Exhibit 6), prior to or at the time he received a check for $475.78.

Answer: Yes.

Question: Did plaintiff have an opportunity to read the bank check of September 5, 1944, for $475.78 (Exhibits 12-17) between the time he received said check and the time he received payment therefor.

Answer: Yes.

Question: Was plaintiff prevented from reading the "agreement and release" of September 5, 1944. (Exhibit 6.)

Answer: No.

Question: If you find by a preponderance of the evidence that plaintiff was injured on May 29, 1944, and that such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of defendant, then state of what such negligence consisted.

Answer: The evidence of neglect is found in the fact that the plaintiff did not have immediate and the proper hospital care.

Respondent filed a motion for judgment notwithstanding the verdict, later sustained, and a motion for judgment on the special findings of fact, later overruled. Judgment was accordingly entered for Respondent, following which an appeal was taken by Petitioner to the Court of Appeals which reversed the judgment of the Common Pleas Court. The Supreme Court of Ohio reversed the judgment of the Court of Appeals for reasons stated in its opinion.

STATEMENT OF THE CASE.

On May 29, 1944 at 10:08 A. M., Petitioner, then fifty (50) years of age, and an experienced railroad fireman, was riding in the cab on the left side of a steam locomotive traveling westerly, about thirty (30) to thirty-five (35) miles per hour, as it approached Rushmore, Ohio. For some unknown reason the locomotive was derailed near a switch or frog, coming to a standstill on its right side. Petitioner was thrown and bounced around in the cab and then crawled out of the window of the upturned left side of the engine. He remained there a short while, then walked unassisted about one-fourth mile, to a highway, then was driven in an automobile to a doctor's office where he received first aid. He then went to a bar and had some beer, and then to his rooming house, where he slept several hours. He then had his supper and again went to a bar where he had some more beer. Later that evening he was driven in an automobile from Delphos, Ohio, to the East Akron yard of Respondent, a distance of 167 miles,—where he got his own car and drove about two miles to his home, then to bed.

The next day, around 12:40 P. M., Petitioner, at the request of Respondent's doctor, went to the Akron City Hospital for observation, where he remained until June 2nd, 1944 at 2:30 P. M. An examination revealed some "multiple contusions" (none on the left abdomen). An X-ray examination of the cervicle spine showed "definite osteo-arthritic changes of the mid-cervicle spine with an increase of the usual lordotic curve," but "no evidence of fracture or dislocation," and "there was no evidence of any fractured ribs." His condition on discharge was "good." (Exhibit No. 5, R. 123.)

On June 13, 1944, he was again examined by Respondent's doctor and O. K.'d to go back to work. He returned to work on June 15th and worked the rest of that month and also on July 1st, 3rd and 4th. He then consulted his own doctor, Dr. B. W. Shaffner (deceased at time of retrial) and

also Dr. E. M. Walker. Dr. Shaffner had him return to the hospital on July 17, 18 and 19, 1944, for X-ray examinations of the upper gastro-intestinal tract and colon, which were negative. (Exhibits Nos. 31, and 31-B, R. 270, 275.) On July 31, 1944, Respondent received Dr. Walker's negative report. (Exhibit No. 11, R. 222, 273.)

On August 31st, 1944, Petitioner again saw Dr. Shaffner, who released him to return to work on September 5, 1944 (Exhibit No. 16, R. 113, 274), *which release was personally taken by Petitioner to Respondent's main office.* He returned to work on September 7th, 1944 and worked the rest of that year, except for a granted vacation of six days. He worked throughout 1945 with earnings of $2569.35; 1946 with earnings of $2781.04, and up until April 24, 1947, with earnings of $894.02, *at which time he voluntarily quit.* (Exhibits Nos. 35A to 35N, R. 238, 275.) Since that date he has been carried on Respondent's employment roll, Fireman Senior Roster, and under the rules of the Union, of which Petitioner is a member, and the rules of the company, providing he can pass the pre-requisite physical examination, is eligible for employment. Petitioner said he was off work a total of 140 days from May 29, 1944 to April 25, 1947, but did not say that this was due to a physical disability. In 1945, 1946 and 1947, he was on the extra board (low in seniority) and work started to fall off in the fall of 1945 at the end of the war.

On June 14, 1944, Petitioner went to Respondent's office and presented his longhand statement for $84.19 for damage or loss of personal property, sustained in the accident (Exhibit No. 5, R. 217, 271), and asked that the same be paid, which, on the same date, was paid by a check payable to Petitioner's order and subsequently endorsed by him. (Respondent's Exhibit No. 6, R, 217, 272.) On the same date, he received another check for $139.66, payable to and endorsed by him (Exhibit No. 7, R. 217, 272), which had on its face the following notation: "*In full settlement for injuries received at Rushmore, 10:08 A. M: May 29,*

1944." At that time he signed in duplicate an "agreement and release" with his signature affixed thereon in six different places. (Exhibit 8, R. 220, 272.)

On August 8, 1944, he again went to the main office of Respondent, after having consulted his own doctors and after having further X-rays taken, and again asked for and received a check for $75.00, payable to his order and endorsed by him, which had on its face the following notation: "For additional partial settlement of personal injuries received at Rushmore, 10:08 A. M. on May 29, 1944" (Exhibit No. 9, R. 221, 272) and also signed a separate receipt. (Exhibit No. 10, R. 221, 272.)

On August 14 and 28, 1944, he went to the main office of Respondent, and on each occasion requested and received a check for $75.00, payable to his order and endorsed by him, which had on its face the following notation: "For additional partial settlement of injuries received at Rushmore, Ohio at 10:08 A. M, May 29, 1944." And also signed a separate receipt. (Exhibits Nos. 12a, R. 223, 273; 13, R. 223, 274; 14, R. 218, 274; 15, R. 224, 274.)

On September 5, 1944, Petitioner again voluntarily went to the office of A. W. Hochberg, not an official or director of Respondent, but a Chief Clerk to H. G. Watkins, Respondent's Vice-President in charge of Operations. *At this time, Petitioner gave to Mr. Hochberg, Dr. Shaffner's O. K. to return to work* (Exhibit No. 16, R. 113, 274), *and told him "I'm ready to go back to work." Whereupon, after about an hour an "agreement and release" was prepared, and signed in duplicate, by Petitioner in six separate places.* (Exhibits 6 and 18—R. 5, 125, 165, 147, 274.) At this time, Petitioner was given a check for $475.78, payable to his order and later endorsed by him, which had on its face: *"In full settlement account of injury received at Rushmore, Ohio; 10:08 A. M. on May 29, 1944."* On the back of the check and above the endorsement of Petitioner appeared the following: *"This voucher check is a payment in full of the within account, and it is agreed that the payee's*

endorsement thereon shall constitute the acknowledgment of such payment.'' (See Exhibit 12, R. 273.) Petitioner had this check in his possession for about twenty-four hours before he cashed it. (R. 150.)

The conversation between Petitioner and Hochberg, appears in the record at pages 128 to 149 inclusive; 153, 234, 236; 252, 257, 258, 262.

Petitioner's total wages for 1944 amounted to $2476.92, of which $191.56 was withheld for Federal Income Tax, as evidenced by a required Withholding Receipt, Form W2. (Exhibit No. 39—R. 227, 275.) This amount did not include the payments of $84.19; $139.66; the three of $75.00 each, and the $475.78. Petitioner did not pay any Federal Income Tax on this aggregate amount of $924.63, nor did Respondent report or withhold under the Federal Railroad Retirement Law, anything therefrom for tax purposes. (Exhibits Nos. P. R. 1 to No. P. R. 21—R. 239, 275.) Petitioner's pay checks for 1944 (Exhibits P. C. Nos. 1 to P.C. No. 22—R. 225, 275) differed in form, language and style from the checks used in payment of the $924.63. His pay checks were accompanied by stubs showing total earnings and deductions therefrom, but the other checks did not have any such stubs.

Under an agreement between Respondent and the Firemen's Union (Exhibits No. 24 and No. 24a, R. 265, 267, 275), Petitioner was required to take certain examinations for promotion to Engine-man, and if he failed to pass such examinations he went to the foot of the Firemen's Roster. Petitioner was eligible to take such examinations and before April 24, 1947, had passed the oral part thereof. On April 24, 1947, he voluntarily started to take the written part of the examination but quit before it was finished. (Exhibit No. 27—R. 156, 276.) He never made any request to complete the examination nor has he ever been denied an opportunity to complete the examination but on the contrary started this action on May 21, 1947. *At no time prior to the time of the filing of his first reply, to-wit: August 4, 1947, did*

he ever complain of or charge anyone connected with the Respondent of any fraud, misrepresentation, or breach of any promises, nor did he offer to make any tender of any of the $924.63 until after the filing of Respondent's answer.

Petitioner first attempted to say that he could not read, but this was absolutely refuted. He also attempted to say that at no time did he read what he signed, *notwithstanding he voluntarily affixed his signature fifteen times to agreements, releases and receipts and endorsed six checks payable to his order. He in writing said that he understood the contents of the agreements and releases and that the affixing of his signature was his free and voluntary act and that he received the sums therein mentioned in full satisfaction of the obligation of Respondent to him under the provisions of the contract.* He also attempted to say that he did not read the checks which he received, notwithstanding the last check for $475.78 was in his possession for some twenty-four hours before being cashed.

We do not have a case where a claimant could not read nor write, did not have an opportunity to read, could not see to read, was prevented from reading, or where a release was misread. (See findings of fact by Jury, R. 19, 20.) There was no evidence that Petitioner in September, 1944, was mistaken as to the nature and extent of any injury he had received or that he went back to work under any mistake of fact either on his part or on the part of Respondent or upon any false promises by Respondent. There was no evidence that he was not informed or was misinformed about his physical condition in September 1944. He was not induced to go back to work at the request of the Respondent. He made no statement with regard to any undisclosed physical condition. There was no competent evidence that the "tumerous mass in the lower left groin" or the "neurosis" as found by his doctor on May 1, 1949, was a direct and proximate result of the accident of May 29, 1944, nor that he had such a condition in September, 1944. There was no

evidence that in September, 1944, Petitioner was suffering from a substantial or severe injury from which recovery was doubtful. His work record and earnings from September 5, 1944 to the date he terminated his employment, indicate that for this period of time he was not physically disabled.

ARGUMENT.

I. Certiorari should be denied because, (a) the State Court did not decide a Federal question of substance not theretofore determined by this Court, nor did it decide any question in a way probably not in accord with applicable decisions of this Court; (b) the validity of a Federal or State statute is not drawn in question; (c) the State Court did not deny "A right, privilege or Immunity" claimed under the Constitution or Statutes of the United States; (d) there is no conflict between the interpretations of Ohio Courts and Federal Courts on the common law relating to the subject of releases; and (e) there are no special and important reasons therefor.

Herein the Ohio Supreme Court simply held that under the pleadings and evidence of the case, the trial Court had the right to determine, under the Ohio law, the validity of an Ohio contract of release executed by an Ohio employee to an Ohio employer, of rights arising under the Federal Employer's Liability Act. The State Court did not decide any Federal question of substance not theretofore determined by this Court, nor did it decide any question in a way not in accord with the applicable decisions of this Court. The validity of a Federal or State statute was not drawn in question. The State Court did not deny a right, privilege or immunity claimed under the constitution or statutes of the United States. There is no conflict between the interpretations of the Ohio Courts and Federal Courts on the common law relating to the subject of releases, and the Ohio decision does not give rise to any such conflict.

The decision of the State Court was based upon a non-Federal ground, adequate and substantial to support it.

The fact that Petitioner contended "the question as to whether the release of an employee's claim under the Federal Employer's Liability Act should be set aside for fraud or mistake, must always be determined by the law as announced by the Federal Courts," did not deny the State Court the right to decide the case on a non-Federal ground. Even though the Court considered the Federal Employer's Liability Act and concluded as this Court did in *Callen vs. Pennsylvania Railroad Company*, 332 U. S. 625, 92 L. ed. 242, that "the releases of railroad employees stand on the same basis as the releases of others," still this does not warrant or require this Court to review the State Court decision. The State Court's decision does not run counter to any law as announced by Federal Courts.

The State Court in deciding this case did not do so under any local rule of practice, but based its decision upon substantive rules of common law, recognized by both Ohio and Federal Courts.

It is a well established principle of this Court, that before it will review a decision of a State Court, it must affirmatively appear from the record that the Federal question was presented to the highest court of the state having jurisdiction, and that its decision of the Federal question was necessary to its determination of the cause. And where the decision of a State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to support the judgment, this Court will not undertake to review it. *Williams vs. Kaiser*, 323 U. S. 471, 89 L. ed. 398.

This Court has also held that it will not review a State decision resting on an adequate and independent non-Federal ground, even though the State Court may have also summoned to its support an erroneous view of Federal

law, and further that where a State Court's decision rests both on its determination of a Federal question and on an adequate and independent non-Federal ground, it is not for this Court to consider the correctness of the non-Federal ground unless it is an obvious subterfuge to evade consideration of a Federal issue. *Radio Station WOW, Inc. vs. Johnson*, 326 U. S. 120, 89 L. ed. 2092; *Hammerstein vs. Superior Court of California*, ... U. S. ....., 95 L. ed. 450; *Flournoy vs. Wiener*, 321 U. S. 253, 88 L. ed. 708; *Young vs. Ragen*, 337 U. S. 235, 93 L. ed. 1333.

It has also been held that it is essential to the jurisdiction of this Court, in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch vs. N. Y.*, 293 U. S. 52, 79 L. ed. 191.

The Federal Employer's Liability Act does not deny railroad employees and employers the right to settle their differences without litigation. *Callen vs. Pennsylvania Railroad Company, supra. Duncan vs. Thompson*, 315 U. S. 1, 86 L. ed. 575.

The fact that the release was of a right given by Federal statute did not preclude the court from determining the validity of such release under any applicable State Law. *Regents of Georgia vs. Carroll*, 338 U. S. 586, 94 L. ed. 363.

2. The Supreme Court of Ohio did not err in deciding that the Trial Court (the Common Pleas Court) had the right to determine, under the pleadings and the evidence of the case, the issue as to whether an employee of a railroad was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employer's Liability Act.

At the outset, it will be noted that none of the Ohio Courts found any fraud in the factum or any mutual mistake. The trial Court found that "the facts do not sustain either in law or in equity the allegations of fraud by clear, unequivocal and convincing evidence," and the Supreme Court said, "There was substantial evidence to sustain the finding for the defendant by the Court on that issue"—"whether the plaintiff was induced by fraudulent representation of the defendant or by mistake to execute the release." *It will also be noted that the jury's findings of fact* (R. 19, 20) *did not indicate anything which would or could invalidate Petitioner's release.*

Upon original trial and retrial, Petitioner insisted that under *Perry vs. M. O'Neil & Company,* 78 O. S. 200, and *Flynn vs. Sharon Steel Corporation,* 142 O. S. 145, the case had to be submitted to the jury. It was not then contended that the Federal law had any application to the release, but in the reviewing courts, *Petitioner contended that the issue of fraud or mistake in the execution of a release in an action under the Federal Employer's Liability Act was for the exclusive determination of the jury regardless of the record.* The Ohio Trial and Supreme Courts did not agree with this contention. In none of the Ohio courts nor in this Court has Petitioner cited any authority for his contention that releases of a railroad employee running to a railroad employer, of rights arising under the Federal Employer's Liability Act, stand on a different basis than releases of others. At no time has it been pointed out and it is not now pointed out to this Court, that there is any conflict, in the

interpretation of the common law of releases, between Ohio Courts and Federal Courts. There is no such conflict. The cases cited by Petitioner, as reasons for granting the writ herein, are simply cases in which the courts felt that under the issues and the evidence thereof, a jury issue was presented on the question of the validity of a release. They do not hold that in every case where there is an issue as to the validity of a release such issue must be submitted to a jury. The facts of each of the cases cited are distinguishable from the facts of the instant case.

There is no conflict between the decisions of the State Court and the Federal Courts on the subject of releases. The common law as interpreted by the Ohio Courts is consistent with the common law as interpreted by the Federal Courts. In the instant case the release was not void and the most that could be said it was voidable. We do not know of any Federal rule that there is no distinction between a release that is void and one voidable. Federal Courts have not wiped out the distinction between equitable issues and issues at law, nor changed the procedure for disposing of equitable defenses. Neither they nor Congress have prescribed any special procedure for the determination of the validity of the release of a railroad employee, as distinguished from the release of any other person.

It is a well known rule that "where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and if an issue of law remains it is triable to a jury."

Radio Corporation vs. Raytheon Mfg. Co., 296 U. S. 459, 80 L. ed. 327; *Liberty Oil Company vs. Condon National Bank*, 260 U. S. 235, 67 L. ed. 232. (Citing Ohio cases): *American Mills Company vs. American Surety Company*, 260 U. S. 360, 67 L. ed. 306; *Meyer vs. Meyer*, 153 O. S. 408; *Pickesimer vs. B. & O. R. R. Co.*, 151 O. S. 1.

At the beginning of re-trial, Respondent raised the question of the sufficiency of Petitioner's amended reply

and objected to proceeding to trial until the validity of the release was first determined, as a matter of law, separate and apart from the determination of any issues of fact. Under either Ohio General Code, Section 11379 providing "Issues of law must be tried by the Court, unless referred as hereinafter provided. * * *," or the Federal law, the issues of law raised by the pleadings were properly for determination by the court. The Federal law is quite clear on this subject. *Hill vs. Northern Pacific Ry. Co.*, 104 Fed. 754; *Hoad vs. N. Y. C. R. Co.*, 6 F. S. 565, 3 F. S. 1020; *Ross vs. Service Lines Inc.*, 31 F. S. 871; *Cavender vs. Virginia Bridge & Iron Co.*, 257 Fed. 877; *Union Pacific R. Co. vs. Syas*, 246 Fed. 561; *Fay vs. Hill*, 249 Fed. 415; *Pringle vs. Storrow*, 9 Fed. 2nd 464.

The Ohio law is quite clear that if a release is not void but only voidable, the releasor cannot maintain an action for the original wrong until the release is set aside, *Perry vs. O'Neil & Co. supra*; *Jackson vs. Ely*, 57 O. S. 450; *Cassily vs. Cassily*, 57 O. S. 382; *T. & O. C. Ry. Co. vs. Coleman*, 12 O. C. C. ns. 497, affirmed without opinion, 81 O. S. 522. We do not know of any Federal Rule to the contrary.

If the Court had the right to submit the question of the release to the jury, then under both Ohio and Federal law, the general verdict was not binding upon the court and the Court had the right to consider all the evidence and the special findings of the jury as advisory and enter judgment accordingly. (*American*) *Lumbermen's Mutual Casualty Co. of Illinois vs. Timms & Howard Inc., et al.*, 108 Federal 2nd 497; *Federal Reserve Bank vs. Idaho, Grimm Alfalfa Seed Association*, 8 Federal 2nd, 922, certiorari denied; *Perkins vs. Frudential Insurance Co. of America*, 69 Fed. 2nd, 218; *Idaho & Oregon Land Improvement Co. vs. Bradbury*, 132 U. S. 509; 33 L. ed. 433; *Kohn vs. McNulta*, 147 U. S. 238, 37 L. ed. 150; *Dunphy vs. Kleinschmidt*, 78 U. S. 610, 20 L. ed. 223; *Perego vs. Dodge*, 163 U. S. 160, 41 L. ed. 113.

The *Bradbury* case, *supra*, holds:

"6. In an equity suit, the court may disregard the verdict and findings of a jury upon issues of fact submitted to them, either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. It is not necessary that a court of equity should formally set aside the verdict or finding of a jury, before proceeding to enter a decree which does not conform to it."

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. *Quimby vs. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Basey vs. Gallagher*, 20 Wall. 670, 22 L. ed. 452.

In a suit for damages under the Federal Employer's Liability Act, the burden of showing alleged fraud vitiating the contract of compromise and release, rests upon the parties attacking the release. *Callen vs. Pennsylvania Railroad Co. supra; Collette vs. L. & N. R. Co.*, 81 Fed. Sup. 428 (District Court of Illinois).

Fraud is never presumed. The Ohio and Federal Courts have uniformly held fraud is an affirmative defense to be established by clear, unequivocal, satisfactory and convincing proof, rather than mere preponderance of evidence. This rule was recognized by the Circuit Court of Appeals in the *Callen* case, 162 F. 2nd 832, as pointed out by Judge Taft in the Ohio decision. The Ohio decision is in keeping with other decisions upholding releases, as shown by the following:

Upton, Assignee vs. Tribilcock, 91 U. S. 45, 23 L. ed. 203;

George vs. Tate, 102 U. S. 564, 26 L. ed. 232;

Andrus vs. St. L. S. & R. Co., 130 U. S. 643, 32 L. ed. 1054;

C. & N. Ry. Co. vs. Wilcox, 116 Fed. 913;

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Whitney Co. vs. Johnson, 14 Fed. 2nd 24;
Reinhardt vs. Weyerhaeuser Timber Co., 47 F. S. 335;
Stumpf vs. Stumpf, 28 Ohio Law Abstract 479;
T. & O. C. Ry. Co. vs. Coleman, 12 O. C. C. ns. 497, affirmed without opinion, 81 O. S. 522.

The following cases are worthy of consideration in their entirety:

Chicago St. P. M. & D. Ry. Co. vs. Bellwith, 83 Fed. 437;
Heck vs. Missouri P. Ry. Co., 147 Fed. 775;
Hill vs. N. P. Ry. Co., 104 Fed. 754;
Gladish vs. Penn. Co., 107 Fed. 61;
Spitze vs. B. & O. R. R. Co., 23 A. 307, Md.;
Rader vs. Lehigh Valley R. Co., 26 Fed. 2d 73;
Yocum vs. Chicago R. I. & P. Ry. Co., 249 N. W. 672, Minn.

A case containing facts similar to those of the instant case is *Merwin vs. N. Y., N. H. & H. R. Co.*, 62 Fed. 2nd 803, N. Y. C. C. A.

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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